**Johnson & Hardin Co. *and* Graphic Communications International Union, Local 508, O-K-I, AFL–CIO–CLC.** Case 9–CA–25372

November 21, 1991

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On February 15, 1989, Administrative Law Judge Claude R. Wolfe issued the attached decision. The Respondent filed exceptions and a supporting brief, and the Charging Party filed a brief in opposition to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and has decided, for the reasons stated below, to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified.

1. The judge found that the Respondent violated Section 8(a)(1) of the Act by excluding three union organizers from the driveway leading to the Respondent's plant. Union Executive Vice President Harold Perry and members Daniel Zeisler and Anthony Arnold distributed organizational literature to the Respondent's employees during shift change on the morning of April 27, 1988. To pass out the literature, the organizers stood in the long driveway leading from a public roadway to the Respondent's plant. After about 15 minutes, William Scarpaci, the Respondent's vice president of operations, told the union organizers that they were on the Respondent's property and asked them to leave. The organizers, however, remained in the driveway. Scarpaci returned about 15 minutes later, accompanied by a group of employees. This time the organizers heeded Scarpaci's request to depart. Scarpaci then called the police, who arrived after the organizers had left.

In finding the Respondent's expelling of the organizers unlawful, the judge found that the Respondent's driveway was on land owned by the State of Ohio in which the Respondent possessed only an easement for ingress and egress. Because the Respondent's easement gave it no right to control the property but merely a right to use it for ingress and egress and because the Union's handbilling posed minimal if any interference with that right, the judge concluded that the Respondent's exclusion of the union organizers from this property violated the Act.

The Respondent contends that the judge erred in failing to consider, pursuant to the Board's decision in *Jean Country*,[2] whether, without access to the driveway, the Union had reasonably effective alternative means to convey its message to the Respondent's employees. The balancing test set forth in *Jean Country*—of which assessment of reasonable alternative means is part—is applicable, however, only in cases where property rights and Section 7 rights conflict. When an employer does not possess a property interest entitling it to exclude individuals from the property even if their presence were not protected by Section 7, the employer's exclusion of such individuals from the property does not implicate *Jean Country*'s balancing test. Absent such a property interest, the exclusion of the individuals presents no conflict between the asserted Section 7 right and the employer's property right. Thus, to invoke the *Jean Country* balancing test, the employer must meet the threshold burden of showing that it possesses such a property interest[3] As we agree with the judge that the Respondent failed to make this showing, we adopt his finding that the Respondent's exclusion of the organizers violated Section 8(a)(1).

2. The Union's unfair labor practice charge concerning the Respondent's exclusion of the union organizers from the driveway was served on the Respondent about 5 days after this incident occurred. After the Respondent received the charge, the Respondent filed complaints in the Mayor's Court for the Village of Fairfax, Ohio, alleging that the organizers had knowingly entered on the Respondent's premises in violation of a county criminal trespass ordinance. Warrants were then issued for arrest of the three organizers.[4]

The judge found that the Respondent's filing of the criminal trespass complaints violated Section 8(a)(1) of the Act. He provided no separate rationale for this finding but, rather, appeared to view it as following directly from his conclusion that the Respondent's exclusion of the organizers from the driveway violated the Act.

In deciding whether the filing of a state court civil lawsuit is an enjoinable unfair labor practice, the Board, under the teachings of the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*,[5] must

[1] The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] 291 NLRB 11 (1988). In *Jean Country*, the Board interpreted *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105 (1956), and its progeny.

[3] See *Jean Country*, above, at 13 fn. 7; *Giant Food Stores*, 295 NLRB 330 (1989), motion for reconsideration denied 298 NLRB 410 (1990).

[4] On the only occasion during the hearing that any party attempted to adduce evidence concerning the disposition of the trespass complaints, the administrative law judge sustained an objection to the testimony. No exceptions were filed to his ruling. Thus, although the parties' briefs make reference to the disposition of the trespass complaints—and present varying characterizations of it—there is no record evidence on this matter.

[5] 461 U.S. 731 (1983).

determine whether the lawsuit lacks a reasonable basis in law and fact and whether the lawsuit was filed with a retaliatory motive[6] The reasoning expressed by the Court in *Bill Johnson's* for requiring this inquiry leads us to conclude that the same analysis should be applied here, where the Respondent filed not a civil lawsuit but criminal complaints.

In *Bill Johnson's*, the Court recognized that lawsuits filed by employers may be powerful instruments of coercion or retaliation. Nevertheless, the Court found that overriding this concern were the right of access to the courts, which is an aspect of the first amendment right to petition for redress of grievances, and the States' compelling interest in maintaining domestic peace. Therefore, the Court held that a lawsuit that has a reasonable basis in law and fact is not an enjoinable unfair labor practice even if the employer's motive in filing it is to retaliate against employees for exercising their Section 7 rights.

The same considerations are implicated in the Respondent's filing of criminal trespass complaints. A state criminal complaint, perhaps even more than a state-court civil lawsuit, invokes the State's compelling interest in maintaining domestic peace. Moreover, the filing of a criminal complaint, which ''set[s] in motion the governmental machinery which redresses violations of municipal ordinances,''[7] is, like the filing of a civil lawsuit, an aspect of the right to petition the Government for redress of grievances[8] Accordingly, we find that the criteria used in *Bill Johnson's* should be applied in evaluating whether the Respondent's filing of the criminal trespass complaints against the union organizers violated Section 8(a)(1).[9]

Application of these criteria leads us to conclude that the Respondent violated Section 8(a)(1). First, we find that the Respondent's filing of the criminal trespass complaints lacked a reasonable basis in law and fact because, as the judge found, the driveway leading to the Respondent's plant was on land owned by the State of Ohio and the Respondent did not possess an interest in this property sufficient to exclude from it trespassers, such as the organizers here, who were not interfering with the Respondent's right to use the driveway for ingress and egress.[10] The subjective belief of the Respondent's vice president that the Respondent had fee simple ownership of the property in question is not relevant to whether the criminal trespass complaints filed by the Respondent had a reasonable basis in law and fact, as this test is an objective one.[11]

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[6] See, e.g., *H. W. Barss Co.*, 296 NLRB 1286 (1989); *Phoenix Newspapers*, 294 NLRB 47 (1989); *Bill Johnson's Restaurants*, 290 NLRB 29 (1988).

[7] *Lane v. Correll*, 434 F.2d 598, 600 (5th Cir. 1970).

[8] See *Lane v. Correll*, above. In *Leeke v. Timmerman*, 454 U.S. 83 (1981), the Supreme Court, citing with approval *Lane v. Correll*, appeared to recognize the right of individuals to seek criminal warrants for the arrest of others as an aspect of the right to petition the Government for redress of grievances. The Court found this right not to have been violated in that case by a state official's presenting information to a magistrate in opposition to issuance of the warrants, as the official's action did not interfere with the right of those seeking the warrants to bring their complaints to the attention of the magistrate.

A similar issue was presented in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984). The employer there argued that its request to the Immigration and Naturalization Service (INS) to check the immigration status of the employer's employees was protected as an aspect of the first amendment right to petition for redress of grievances and, thus, could not be found to violate the Act. The Court rejected this argument on the basis that the employer, in invoking the INS process, was not seeking redress of any wrongs committed against itself.

The action of the Respondent here in filing the criminal trespass complaints is distinguishable from the employer's request to the INS in *Sure-Tan*; the complaints the Respondent filed sought to redress the alleged wrong that the Respondent itself suffered from the asserted trespass on its property. Thus, the Court's holding in *Sure-Tan* does not preclude the Respondent's filing of the criminal complaints from coming within the protection of the first amendment right to petition. Additionally, we note that the Court in *Sure-Tan*, although rejecting the employer's argument that its request to the INS was privileged under *Bill Johnson's*, did not hold that the underlying reasoning of *Bill Johnson's* was applicable only to civil lawsuits.

[9] Member Devaney agrees that retaliatory motive and lack of reasonable basis are the appropriate criteria for determining whether an employer's filing of a criminal trespass complaint violates Sec. 8(a)(1). Although finding *Bill Johnson's* not directly applicable to the present case because *Bill Johnson's* involved a civil lawsuit, Member Devaney finds these criteria applicable here because of the importance the American system of justice places on the rights of parties to seek vindication of their legal claims in court. He agrees that the Respondent's filing of the criminal trespass complaints comes within the protection afforded by the first amendment for petitioning the Government for redress of grievances.

[10] The state court disposition of the criminal trespass complaints would have been relevant to our determination of whether the complaints had a reasonable basis in law and fact. As noted at fn. 4 above, however, no evidence on this point was received into the record, and no exception to its exclusion was filed. Thus, introduction of this evidence is deemed to have been waived. See *Bill Johnson's*, above, 461 U.S. at 750 fn. 15.

[11] The dissent is in error in its reliance on Ohio law to support the argument that the Respondent had a reasonable basis for the filing of its criminal complaints. *Wolf v. Roberts*, (CP) 30 O Ops 499, 420 OL Abs 449 (1945), relied on by the dissent, states that, by virtue of a public easement in a warranty deed, a plaintiff:

> cannot prevent even a trespasser from using the land, if it does not impede his [the plaintiff's] exercise of its use as a right of way. [Citation omitted. Id. at 500.]

Here, the judge credited the testimony of union witnesses that, in the driveway where the union representatives were handbilling, ''there was no backup of traffic'' (Harold Perry); that there was no ''steady line of cars'' entering or exiting the driveway (Dan Zeisler); and that ''we stepped out of the way so we didn't interfere with the traffic coming in or out'' (Anthony Arnold). As the judge also found, even the Respondent's witness, Douglas Miller, confirmed that the handbilling posed no delay to his arriving at work on time. Thus, the credited testimony furnishes no basis for the Respondent's contention that the handbillers ''impede[d]'' exercise of the easement's ''use as a right of way'' under Ohio law, nor for our dissenting colleague to assert that the Respondent can defend the reasonableness of its action on the bald claim that ''Union handbillers caused a delay of vehicles'' entering the driveway. Thus, the Re-

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Additionally, we find that the Respondent's filing of the criminal trespass complaints against the union organizers had a retaliatory motive. The Respondent did not file the criminal complaints until shortly after it received the unfair labor practice charge the Union had filed against it. Indeed, the Respondent admits that it read the charge before it filed the criminal complaints. In explanation of this sequence, the Respondent states that, consistent with its asserted policy of filing criminal charges against trespassers,[12] it had desired to file the criminal complaints sooner but had been unable to do so until it learned the names of the union organizers who had been in the driveway. Its receipt of the unfair labor practice charges, which contained the names of the organizers, gave the Respondent the information it needed to file the criminal complaints.

We find this explanation unpersuasive. We note first that, despite the Respondent's purported policy of pressing criminal charges against trespassers, it failed to summon the police when the union organizers refused the Respondent's initial request to leave the driveway. Rather, the Respondent neglected to contact the police until after Scarpaci made a second request for the organizers to leave and they departed. As the organizers were gone before the police were called, the police had no opportunity to arrest them.

Additionally, it appears that before Scarpaci asked the organizers to leave, he introduced himself to them and they, in turn, told him their names.[13] Thus, contrary to the Respondent's contention, the Respondent had learned the organizers' names prior to receiving the unfair labor practice charge.

Finally, even accepting the Respondent's assertion that it did not know the organizers' names until it received the charge, there is no evidence that the Respondent had made any effort to obtain the organizers' names. For example, even though Scarpaci had been given the Union's literature, which included the Union's address and telephone number, there is no evidence that the Respondent had contacted the Union to request the names of the organizers.

Accordingly, as we are not persuaded by the Respondent's explanation for the timing of its filing of the criminal complaints against the organizers, we infer from the timing of the Respondent's filing of the complaints shortly after its receipt of the Union's unfair labor practice charge that the Respondent's action was prompted by the Union's charge. For this reason, as well as the others discussed above, we conclude that the Respondent's filing of criminal trespass complaints against the organizers had a retaliatory motive.[14] As the Respondent's filing of the criminal complaints lacked a reasonable basis in fact and law and had a retaliatory motive, we conclude that, by filing the complaints, the Respondent violated Section 8(a)(1).

3. The Respondent excepts to the provision in the judge's recommended Order that the Respondent withdraw the criminal trespass complaints filed against the three union organizers. The Respondent asserts that, once the complaints were filed, the Village of Fairfax, Ohio, had control of the criminal proceedings and the Respondent had no authority to withdraw the complaints. Although calling the Respondent's argument ''hypertechnical,'' the Union agrees that, under Ohio law, only the court or the prosecutor may withdraw the criminal charges. Accordingly, we will modify the judge's recommended Order to require that the Respondent request the appropriate Ohio court or official to dismiss the criminal trespass complaints. As is customary in cases such as the present one, we shall also order the Respondent to join the union organizers, if they so request, in petitioning the appropriate police department and local court to have any proceedings involving the Respondent's criminal complaints at issue expunged from the police and court records.[15]

4. Finally, the Respondent excepts to the provision in the judge's recommended Order that the Respondent make whole the union organizers for any legal expenses and fines incurred by them as a result of the Respondent's criminal trespass complaints filed against them. We find, however, that such a reimbursement requirement is entirely appropriate to remedy the injury caused to the union organizers as a direct result of the

spondent has not met its burden of showing that it had a property interest on which it could demonstrate a reasonable basis for excluding the union representatives.

[12] The Respondent presented evidence that it has ''no trespassing'' signs posted around its property and that it once brought criminal charges against a former employee who had entered its plant without the Respondent's permission. The judge found the latter incident irrelevant to this proceeding, and we agree that it is substantially different from the facts of the present case, in that the union organizers did not enter, or even come near, the Respondent's plant.

[13] Scarpaci and union organizer Arnold testified that Scarpaci introduced himself to the organizers before he asked them to leave. Union organizers Perry and Zeisler testified that Scarpaci introduced himself to the organizers and they introduced themselves to him. In fact, Zeisler testified that Scarpaci stated, ''My name is Bill Scarpaci, what is your name?'' Although the judge made no credibility resolutions, no witness specifically disputed Perry and Zeisler's testimony that the organizers introduced themselves to Scarpaci.

[14] In finding that the filing of the criminal trespass complaints had a retaliatory motive, Member Devaney additionally notes that the complaints were aimed directly at the protected conduct—the organizers' presence in the driveway to distribute organizational literature. Cf. *H. W. Barss Co.*, 296 NLRB 1286 (1989) (suit found retaliatory because, inter alia, it was aimed directly at protected activity); *Phoenix Newspapers*, 294 NLRB 47 (1989) (same). Member Devaney further notes that the potential consequences—fines and imprisonment—of a criminal action carry a stigma which the finding of civil liability does not. Consequently, the Respondent's initiation of criminal action against the organizers, rather than a less drastic means of protecting its property rights, is an additional indication of Respondent's motivation.

[15] See, e.g., *Clark Manor Nursing Home*, 254 NLRB 455 (1981); *Medical Center Hospitals*, 244 NLRB 742 (1979); *Baptist Memorial Hospital*, 229 NLRB 45 (1977).

Respondent's unlawful filing of criminal trespass charges against them and to restore the status quo to that which existed before the Respondent's unlawful action. To the extent that *Montgomery Ward & Co.*,[16] on which the Respondent relies, holds that reimbursement of legal fees and expenses incurred by nonemployee union representatives as a result of a respondent's unlawful conduct may not be awarded, it has been implicitly overruled by subsequent precedent.[17] Moreover, contrary to Montgomery Ward, in considering the availability of reimbursement of legal fees and expenses as a remedy, we see no basis for distinguishing between employees and nonemployee union representatives as recipients of reimbursement. Accordingly, we adopt the judge's recommended Order in this regard.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Johnson & Hardin Co., Fairfax, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

''(a) Request the appropriate Ohio court or official to dismiss the criminal trespass complaints the Respondent filed against Harold Perry, Daniel Zeisler, and Anthony Arnold, notify them in writing that this has been done, and, if they so request, join them in petitioning the appropriate police department and local court to request that any proceedings involving the Respondent's criminal complaints against them be expunged from their records, and pay any expenses involved in the expunction proceedings.''

2. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Reimburse Harold Perry, Daniel Zeisler, and Anthony Arnold for the legal fees and expenses they incurred in defense of charges resulting from the criminal trespass complaints that the Respondent filed against them.''

3. Substitute the attached notice for that of the administrative law judge.

MEMBER RAUDABAUGH, dissenting in part.

I disagree with my colleagues' conclusion that the Respondent had no reasonable basis for filing its trespass complaint. My colleagues base this conclusion on their finding that the Respondent had no property interest in the driveway leading to the plant. However, a finding that the Respondent had no property interest in the driveway is a far cry from a conclusion that the Respondent had no reasonable basis for making the claim. In the instant case, the Respondent's claim was backed up by the public authorities who issued the warrants. In Ohio, no warrant can issue unless a public officer has made a finding of probable cause.[1] Hence, in the instant case, a public official was required to make a finding that there was ''probable cause'' that the Respondent had a property interest in the driveway leading to its plant. There is a presumption of regularity in the issuance of a warrant by a public official.[2] Accordingly, it can be presumed that officials in this case had a reasonable basis for believing that the property was sufficiently private to warrant a criminal trespass action.

Further, there is independent evidence to support the view that the Respondent's claim was at least reasonable. The driveway is an easement leading to the Respondent's plant. In addition to maintaining the driveway and its bordering posts and cables, the Respondent maintains the trees, bushes, flowers, and grass immediately adjacent to its easement. The Respondent has also placed ''no trespassing'' signs on that property. The Respondent's business insurance covers liability for events occurring on the easement.

Moreover, where a public easement leads to private property, Ohio law permits the property owner to oust a person from the easement if that person is impeding the property owner's use of the easement as a right of way.[3] In the instant case, the Respondent's trespass claim was bolstered by the evidence that union handbillers caused a delay of vehicles seeking to use the easement to enter the Respondent's property.[4]

Based on the above, I believe that the Respondent's trespass claim was not baseless. Accordingly, the Respondent was entitled to seek the protection of Ohio law, and the public authorities were entitled to go to Ohio courts in vindication of Ohio law.[5]

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[16] 288 NLRB 126 (1988), enf. denied on other grounds 904 F.2d 1156 (7th Cir. 1990).

[17] See *Summitville Tiles*, 300 NLRB 64 (1990); *H. W. Barss Co.*, 296 NLRB 1286 (1989); *Phoenix Newspapers*, 294 NLRB 47 (1989).

[1] *Ohio Rules of Criminal Procedure*, Rule 3. See also 26 O Jur. 3d, Sec. 465.

[2] See *State v. Williams*, 19 O App 2d 234, 48 O Ops 2d 365, 250 NE2d 907 (1969); *U.S. v. Chemical Foundation*, 272 U.S. 1, 14–15 (1926); and *Ross v. Stewart*, 227 U.S. 530, 535 (1913).

[3] See *Wolf v. Roberts*, (CP) 30 O Ops 499, 420 OL Abs 449 (1945).

[4] The majority characterizes the Respondent's assertion of delay as being a ''bald claim.'' In fact, the assertion is supported by the judge's finding that the Union's distribution of handbills caused ''some delay of entering vehicles.'' Concededly, there is other evidence that there was no ''backup of traffic'' or ''a steady line of cars.'' However, the issue is whether the Respondent had a reasonable basis for asserting that there was an ''impeding'' under Ohio law. The fact that there is evidence countering the Respondent's evidence does not establish that the Respondent's claim was baseless.

[5] The complaint alleges that the Respondent's act of filing the complaint with public authorities was unlawful. The complaint does not allege that the public officials' filing of the criminal prosecution was unlawful. In addition, there is no contention that the criminal prosecution became preempted and unlawful after the filing of the

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General Counsel's complaint in this case. In these circumstances, I do not pass on the issue of whether the criminal proceeding became unlawful as of the date of the General Counsel's complaint.

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT attempt to prevent representatives of Graphic Communications International Union, Local 508, O-K-I, AFL–CIO–CLC, or any other union, from distributing union literature to our employees on the drive leading from Red Bank Road to our premises, nor will we file complaints of trespass against them because they engage in such conduct.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL request the appropriate Ohio court or official to dismiss the criminal trespass complaints we filed against Harold Perry, Daniel Zeisler, and Anthony Arnold, notify them in writing that this has been done, and, if they so request, join them in petitioning the appropriate police department and court to request that any proceedings involving our criminal complaints against them be expunged from their records, and pay any expenses involved in the expunction proceedings.

WE WILL reimburse Harold Perry, Daniel Zeisler, and Anthony Arnold for the legal fees and expenses they incurred in defense of charges resulting from the criminal trespass complaints that we filed against them.

JOHNSON & HARDIN CO.

*James Murphy, Esq.*, for the General Counsel.
*Michael W. Hawkins* and *Robert D. Hudson, Esqs.*, for Johnson & Hardin Co.
*Robert Mitchell, Esq.*, for the Charging Union.

## DECISION

### STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Cincinnati, Ohio, on November 29 and 30, 1988,[1] pursuant to charges filed and served on April 27 and June 10, and complaint issued on June 14. The complaint alleges that Johnson & Hardin Co. (Respondent) violated Section 8(a)(1) of the Act by prohibiting union handbill distribution at the entrance to its property, and by filing complaints of criminal trespass against those doing the handbilling. Respondent denies the commission of unfair labor practices.

On the record evidence,[2] and after considering the testimonial demeanor of the witnesses appearing before me and the able posttrial briefs of the parties, I make the following

### FINDINGS OF FACT

#### I. JURISDICTION

Respondent is a corporation with an office and place of business in Fairfax, near Cincinnati, Ohio, where it is engaged in the printing of books and related materials. During the 12 months preceding the issuance of the complaint, Respondent, in the course and conduct of these business operations, purchased and received at its Fairfax, Ohio facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Ohio, and is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

#### II. LABOR ORGANIZATION

Graphic Communications International Union, Local 508, O-K-I, AFL–CIO–CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

#### III. THE ALLEGED UNFAIR LABOR PRACTICES

##### A. *Relevant Facts*

The sole access to Respondent's plant premises is by way of an asphalt paved drive extending from Respondent's totally owned premises for more than 150 feet over land owned by the State of Ohio to a public roadway denominated Red Bank Road. The applicable provision in the general warranty deed conveying the property to Respondent on which its facility is located describes ''an easement for ingress and egress from and to Red Bank Road over a strip of land 24 feet in width.'' Although it appears the paved drive is within the 24-feet width for most of its length, the testimony of William Scarpaci, Respondent's vice president of manufacturing, establishes that it widens as it approaches Red Bank Road to a width of approximately 40 feet at a point about 12-feet short of Red Bank Road. In addition to maintaining the driveway and its bordering posts and cables, Respondent maintains the trees, bushes, flowers, and grass immediately adjacent to its easement, and places no trespassing signs on that property. Respondent's business insurance covers liability for events occurring on the easement.

In March and April, Harold Perry, the Union's executive vice president, received telephone calls from about ten of Respondent's employees expressing interest in union representation. This encouraged Perry to assemble packets of union literature promoting such representation, and, together with union members Daniel Zeisler and Anthony Arnold, to proceed to the driveway leading from Red Bank Road to Respondent's premises at 6:30 a.m. on April 27 and there hand the packets of literature to Respondent's employees as they entered or left in their automobiles. First-shift employees were entering. Third-shift employees were leaving. The handbillers neither stood in front of entering or leaving vehi-

[1] All dates are 1988.

[2] R. Exh. 7, various insurance policies, is received in evidence.

cles nor otherwise attempted to impede or impeded their progress. Not all employees stopped when they reached the union representatives. Those who did opened their windows, accepted the proffered literature, and resumed driving. It does not appear there was any traffic backup caused by departing vehicles pausing to collect the union materials. There was some delay of entering vehicles caused by employees stopping to receive literature. That these stoppages were brief is indicated by the lack of any evidence that any employee was late reporting to work. The brevity of any stoppages of incoming vehicles is confirmed by Douglas Miller, a witness called by Respondent, who testified that there were three or four cars in front of him in the entry drive at about 6:55 a.m., but he still had time to park his car and got to work on time at 7 a.m. At no time did the union representatives enter the plant premises proper. The literature distribution all took place on the easement.[3]

At about 6:45 a.m., William Scarpaci, Respondent's vice president of operations, drove in, accepted the literature, and proceeded into the plant premises where he parked his car. He then walked back to the handbillers, advised them Respondent's property extended to Red Bank Road, and asked them to leave. The union representatives moved closer to Red Bank Road, but remained on the easement. Scarpaci returned to the plant, asked some employees to accompany him, and again went to the union men and asked them to leave. They then did so at about 7:05 a.m. as Scarpaci recalls.

After securing their names from the charge filed by the Union on April 27, Respondent filed complaints in Mayor's Court, Village of Fairfax, Hamilton County, Ohio, alleging that Perry, Arnold, and Zeisler ''without privilege to do so knowingly entered on the premises of the Johnson & Hardin Co. . . . contrary to and in violation of section 130.04 criminal trespass of the Fairfax Code of Ordinances a minor misdemeanor.''[4] The three gentlemen named never entered Respondent's premises proper, but confined their activity to the easement.

### B. *Discussion and Conclusions*

The Board recently held in *Jean Country*[5] that, as the first step in analysis of conflicts between property rights and Section 7 rights:

> [T]here is an initial burden on the party claiming the property right to show . . . that it has an interest in the property and what its interest in the property is. A party has no right to object on the basis of other persons' property interests.

By virtue of the easement in the warranty deed Respondent has the right to freely traverse a path over the real property of another, as described in the warranty deed, between Respondent's owned real estate and Red Bank Road. There is no evidence any other rights in the property were granted to Respondent. The mere fact Respondent elected to pave, maintain, and beautify the area for comfort, convenience, and aesthetic reasons, and treated it as if Respondent were the owner in fee does not make it the owner of the real estate or give it any greater interest in property than that conveyed by the warranty deed.[6] General Counsel cites Ohio Jurisprudence 3d, Section 53, page 456 (36 O.Jur.3d, § 53 (1982)) for the following proposition, in reliance on *Wolf v. Roberts*, (CP) 30 O Ops 499, 420 OL Abs 449 (1945):

> [T]he owner of an easement of way cannot prevent even a trespasser from using the surface of such way, if it does not impede his exercise of its use as a right of way.

This holding is consistent with other persuasive authority explaining:

> The possession of the owner of an easement over land is held not to be sufficient to support an action of trespass for an injury to or disturbance in the enjoyment of the easement.[7]

The April 27 handbilling posed minimal, if any, interference with ingress and none with egress, and I conclude that here, as did the employers in *Polly Drummond Thriftway*,[8] and *Barkus Bakery*,[9] Respondent had a right to use the property from which it excluded the union representatives, but has no property right giving it control over that real estate. Accordingly, I conclude that Respondent violated Section 8(a)(1) of the Act by excluding union organizers from the easement and by filing complaints against them in Mayor's Court, Village of Fairfax, Hamilton County, Ohio, for criminal trespass for distributing union handbills to employees on the easement.

### CONCLUSIONS OF LAW

1. Respondent Johnson & Hardin Co. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By preventing union representatives from distributing literature to its employees on the easement leading to its property, and by filing complaints of criminal trespass against the union representatives in the Mayor's Court, Village of Fairfax, Hamilton County, Ohio, Respondent violated Section 8(a)(1) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[10]

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[3] Witnesses differ regarding how far up the drive the distribution took place. These differences are insignificant because it is clear all distribution was on the easement.

[4] Respondent's past filing of trespass charges against a former employee for entering its plant is irrelevant to this proceeding.

[5] 291 NLRB 11 at 13 fn. 7 (1988).

[6] In the absence of an enabling statute, an easement by prescription cannot be acquired against a State, 25 Am.Jur.2d, *Easements and Licenses* § 41 (1966), nor can adverse possession, 3 Am.Jur.2d, *Adverse Possession* § 270 (1986).

[7] 75 Am.Jur.2d, *Trespass* § 25 (1974).

[8] 292 NLRB 331 (1989).

[9] 282 NLRB 351 (1986), enfd. sub nom. *NLRB v. Caress Bake Shop*, 833 F.2d 306 (3d Cir. 1987).

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

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ORDER

The Respondent, Johnson & Hardin Co., Fairfax, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Preventing union representatives from distributing union literature to its employees on the easement leading to its property, and filing complaints of criminal trespass against them because they engage in such conduct.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Withdraw the complaints of criminal trespass filed against Harold Perry, Daniel Zeisler, and Anthony Arnold in Mayor's Court, Village of Fairfax, Hamilton County, Ohio, notify them in writing that this has been done, and make them whole for any legal expenses and/or fines incurred by them as a result of such complaints.

(b) Post at its Fairfax, Ohio office and facilities copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by Respondent's authorized agent shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''